UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6

MURRAY AMERICAN ENERGY, INC., AND THE MONONGALIA COUNTY COAL COMPANY, A SINGLE EMPLOYER,

and Case 06-CA-215195

UNITED MINE WORKERS OF AMERICA, DISTRICT 31, LOCAL 1702 AFL-CIO, CLC

MURRAY AMERICAN ENERGY, INC., AND THE HARRISON COUNTY COAL COMPANY, A SINGLE EMPLOYER,

and Case 06-CA-218979

UNITED MINE WORKERS OF AMERICA, DISTRICT 31, AFL-CIO, CLC

BRIEF OF THE RESPONDENTS

Respondents Murray American Energy, Inc. ("Respondent MAEI"), The Monongalia County Coal Company ("Respondent Monongalia"), and The Harrison County Coal Company ("Respondent Harrison")(Respondent MAEI, Respondent Monongalia, and Respondent Harrison referred to collectively as the "Respondents"), hereby submit this Brief to the National Labor Relations Board (the "Board") in the above-referenced matters.

I. INTRODUCTION

Judgment should be entered in favor of the Respondents because they did not violate the National Labor Relations Act (the "Act") as a matter of law. The Unfair Labor Practice ("ULP") Charges in this matter allege that the Respondents failed to respond to information requests submitted by the United Mine Workers of America (the "Union") in violation of Sections 8(a)(1)

and 8(5) of the Act. These allegations are without merit because the Respondents complied fully with their obligations under the Act.

Faced with a campaign of harassment through the use of overly broad information requests regarding matters outside the Union's work jurisdiction, the Respondents proposed to the Union that the requests be narrowed so as to elicit only relevant information. The Union refused. Then, the Respondents repeatedly asked the Union to bargain over the costs to be incurred in responding fully to the Union's overly broad requests. The Union refused repeatedly and instead proceeded to file the ULP charges.

Months later, and only after the Respondents raised the issue of the Union's failure to bargain as a defense to these charges, did the Union try and fix their error by suggesting that the Respondents take on further information responsibilities by providing information through the use of a Union-designed form. But the Union's suggestion in this regard cannot hide its bad faith in propounding 8 "cut-and-paste" virtually identical information requests within 27 days, then refusing to bargain over the costs incurred in responding to them.

The Respondents complied with their obligations to the Union in this case. But the Respondents' experience herein serves as a compelling example of why the Board should adopt the modifications made to the Federal Rules of Civil Procedure regarding proportionality in discovery, so that the significance of the information requested by a union must be balanced against the costs to an employer in gathering and producing responsive information.

II. SUMMARY OF MATERIAL FACTS

The materials facts set forth herein are based upon the parties' Joint Stipulations and the Joint Exhibits submitted therewith.

A. The Respondents' Operations

Respondent Monongalia and Respondent Harrison operate coal mines named for the counties in West Virginia where they are predominantly located; respectively, the Monongalia County Mine and the Harrison County Mine. J.S., ¶¶ II.A, B, E.[1] Respondent MAEI is the parent company of Respondent Monongalia and Respondent Harrison. J.S., ¶ II.A.

The hourly production and maintenance employees of Respondent Monongalia and Respondent Harrison are represented for purposes of collective bargaining by the United Mine Workers of America (the "Union"). J.S., ¶¶ VI.A-C. The Union and the Respondents are parties to a collective bargaining agreement, the National Bituminous Coal Wage Agreement of 2016 (the "NBCWA"), which is effective from August 15, 2016 to December 31, 2021. J.S., ¶ IV.D; J.E. 6.

B. The Union's Harassment of Respondent Monongalia Through Repeated Overly Broad and Burdensome Information Requests

Beginning in January 2018, the Union started making blanket information requests to Respondent Monongalia regarding work performed by contractors at the Mine. J.S., ¶¶ VII. A, B, C, D, F, G, I, J, K; J.E. 7, 9, 10, 12, 13, 15(a), 15(b), 16, 18. Although the Union represents only the hourly production and maintenance employees at the Mine, its requests seek information regarding all contractors performing any work at the Mine. *Id*. These requests, a total of 8, submitted in a period of a mere 27 days, were all sent from a Vice President of the Union's Local 1702, via e-mail, with a pre-packaged request pasted into the message. J.S. ¶¶ IV.A-B, V.C; J.E. 7, 9, 10, 13, 15(a), 15(b), 16, 18.

The requests were essentially identical (with only the dates changing and sometimes with

[1] "J.S., ¶ ___ " is used to refer to the parties' Joint Stipulations, filed on August 15, 2019 and "J.E. __" refers to the joint exhibits attached to the Joint Stipulations.

subsequent requests subsuming the material requested in earlier requests) and reveal a scheme to harass Respondent Monongalia and bog it down in endless requests which were overly broad and so voluminous that they served no legitimate purpose. Indeed, a close review of the requests indicates as such with each and every request stating:

> Request For Information
>
> By Local Union
>
> To Whom It May Concern, this is a request for information by the Local Union for the purpose of determining the need to file a grievance and/or to determine if one has merit. We request this information be provided on or before 7 days from today. Failure to provide this information will cause a delay in the grievance procedure, as well as possible Labor Charges.
>
> Date: 1/23/18
>
> Grievance: contract enforcement
>
> Information Requested: All invoice for contractors number of contractors and all work performed by contractors from 1/1/18 to present.
>
> Signature of Union Rep. Jeff Reel
> Date 1/23/28
>
> Delivered to: Jim Travelstead
> Date 1/23/18

A review of all 8 requests reveals that, other than the applicable time frames, the requests are identical. *See* J.E. 7, 9, 10, 13, 15(a), 15(b), 16, 18. Further, a review of the 8 requests reveals that they are simply a conveyor belt of requests, with the Union performing a "cut and paste" on the prior request, changing the applicable date, and hitting send on an e-mail message, designed not to be a good faith request for information for purposes of monitoring the terms of the NBCWA, but, rather, an ongoing campaign of harassment, by which Respondent Monongalia never reaches a point where the requests are satisfied.

On January 29, 2018, Respondent Monongalia answered the Union's initial request of January 23, 2018, with a response sent via e-mail, inquiring into the relevance of the requested material. J.E. 8; J.S. ¶ VII.A. In response to Respondent Monongalia's letter, the Union submitted a second information request that evening at 8:39 p.m., asking for the same information for the time period of January 22, 2018 through January 29, 2018 (the prior request sought such information from January 1, 2018 through January 23, 2018). J.E. 7, 9.

Instead of responding to Respondent Monongalia's letter, the Union sent its third request two days later, on January 31, 2018, calling the request a "second request" and seeking the same information for the time period of January 1, 2018 through January 31, 2018. J.E. 10. Respondent Monongalia responded to the Union that same day, asking again for clarification as to the relevance of the requested information. J.E. 11; J.S. ¶ VII.C. The Union responded to Respondent Monongalia's letters on February 2, 2018, but failed to explain why it needed information as to all contracting performed at the Mine. J.E. 12; J.S. ¶ VII.C.

The Union sent a fourth information request on February 6, 2018, again requesting the same information for all contractors performing work at the Mine for the time period of January 29, 2018 through February 6, 2018. J.E. 13; J.S. ¶ VII.D. Respondent Monongalia sent a letter to the Union via e-mail on February 9, 2018, stating that it was compiling responsive information. J.E. 14; J.S. ¶ VII.E. Nonetheless, the Union sent two more information requests to Respondent Monongalia via e-mail on February 12, 2018. The first, sent at 5:45 p.m., sought the same information the Union previously requested, but for the time period of February 5, 2018 through February 12, 2018. J.E. 16. J.S. ¶ VII.G. Then, around 47 minutes later, the Union sent its sixth information request in 20 days, at 6:32 p.m. via e-mail, asking for the same information for the time period of January 1, 2018 through February 12, 2018. J.E. 15(b); J.S. ¶ VII.F.

On February 14, 2018, Respondent Monongalia sent a letter to the Union addressing the company's concerns that the Union's "vague, non-specific and burdensome requests for information" regarding contracting, but expressed its willingness to find a "reasonable accommodation with the Union." J.E. 17; J.S. ¶ VII.H. Respondent Monongalia noted that the Union's requests for information regarding all contracting performed at the Mine, not just contracting that could impact upon the Union's work jurisdiction, represented overly broad requests. J.E. 17. Respondent Monongalia noted previously that it has asked the Union to "narrow the scope of [its] blanket requests for something more reasonable by relating the requests to a particular contractor, project, or a pending grievance, but the Union has refused to engage with the Company in this process." J.E. 17. Respondent Monongalia also proposed an alternative, asking the Union to "bear the costs of assembling the responses, which include hourly pay for the time of the individuals engaged in assembling the information and the costs of making copies for the Union." J.E. 17.

The Union responded to the letter the following day, February 15, 2018, stating that it is now submitting its seventh request for information regarding "all work performed by contractors on mine property, from January 1, 2018 to present." J.E. 15(a). The Union also said, "[w]e also consider this an ongoing request and would like this information provided to the local on a weekly basis." The Union refused to narrow its requests and did not respond at all to Respondent Monongalia's request for cost sharing. J.E. 15(a).

The Union continued its campaign of information requests by submitting its eighth request on February 19, 2018, for the same information, for the time period February 12, 2018 through February 19, 2018. J.E. 18; J.S. ¶ VII.K. Respondent Monongalia responded the next day, acknowledging receipt of the requests and again asking if the Union will agree to cost

sharing. J.E. 19; J.S. ¶ VII.L. The Union responded on February 21, 2018, by refusing to respond to Respondent Monongalia's inquiry, but instead asking Respondent Monongalia to identify the requests it considered burdensome (even though it had already done so repeatedly). J.E. 20; J.S. ¶ VII.M.

On March 12, 2018, Respondent Monongalia sent a letter to the Union[2] regarding the deluge of harassing and overly broad information requests. J.E. 21 J.S. ¶ VII.N. Respondent Monongalia noted its attempts to ask the Union to narrow such requests or for the Union to share in the costs of responding to the overly broad requests. J.E. 21. Respondent Monongalia invited the Union to meet at a definite time and location, the Wana Portal of the Monongalia County Mine on March 14, 2018, to bargain over cost sharing. J.E. 21. Respondent Monongalia went on to describe the costs associated with responding to the Union's requests and asked the Union to negotiate a cost reimbursement program for requests that are not narrowly tailored. J.E. 21. The Union responded to the letter four days later, on March 16, 2018, and refused to bargain over cost sharing, "[f]inally, we decline your request to negotiate with respect to cost reimbursement." J.E. 22; J.S. ¶ VII.O.[3] As such, Respondent Monongalia has not responded to the Union's requests and this litigation followed. J.S., ¶ VII.Y.

C. The Parties Settled a Grievance Subject to an Information Request at the Monongalia County Mine

In or about March 2018, Respondent Monongalia and the Union were adjusting Grievance No. 1702-31-18 regarding contracting. J.E. 25. The Union submitted an information

[2] District 31 is part of the Union and helps to administer the NBCWA. J.S. ¶¶ IV.C, E.

[3] More than a month later, on April 18, 2018, the Union sent a letter to the Respondents, requesting that the Respondents inform the Union periodically of the details of work contracted out at Respondent MAEI's Marion County Coal Mine. J.E. 23; J.S. ¶ VII.P.

request regarding Grievance No. 1702-31-18 on or about April 4, 2018. J.S., ¶ VII.Q; J.E. 24. During the processing of Grievance 1702-31-18, Respondent Monongalia and the Union agreed that it was related to another grievance previously filed and further along in working its way through the arbitration process, *i.e.*, Grievance No. 1702-14-18. J.S., ¶ VII.Q. As such, the parties subsequently settled Grievance No. 1702-14-18 and, later, the grievance at issue in this case, Grievance No. 1702-31-18. J.S., ¶ VII.Q.

D. The Parties Also Settled Grievance Subject to Information Requests at the Harrison County Mine

In or about April 2018, the Union and Respondent Harrison were adjusting two grievances relating to contracting, Grievance #PP-4-18 and Grievance #PP-5-18. J.S., ¶ VII.R; J.E. 26-27. On April 4, 2018, the Union submitted information requests regarding these grievances. J.S., ¶ VII.R; J.E. 24. The Respondents responded to the Union's requests, stating that it would provide responses to information requests related to particular grievances[4], but that blanket requests should be subject to cost sharing, which the Union refused to bargain over with Respondents. J.E. 28; J.S., ¶ VII.S. Indeed, Respondents letter stated:

> Further, the applicable Company has never stated that it would refuse a valid request for information. Rather, several Companies have requested bargaining over sharing the costs incurred in responding to the blanket requests. Therefore, the only reason that the Union has not received responses to the blanket requests, which would include information pertinent to the list of cases cited in your electronic mail, is because the Union has refused to bargain over cost sharing.

J.E. 28. As reflected in the record, the Union did not respond to the Respondent's letter.

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[4] The issue of contracting out or subcontracting has been a subject of dispute between the Respondents and the Union, with the Union filing grievances resulting in more than 15 arbitration hearings, nearly all of which are not subject to allegations of failure to provide requested information in this case. In some instances, the grievances were sustained and in others they were denied. J.S., ¶ VII.X.

The Union and Respondent Harrison agreed that the two grievances were related and elected to process Grievance #PP-4-18, while holding Grievance #PP-5-18 in abeyance pending the arbitration decision in Grievance #PP-4-18. J.S., ¶ VII.R. Respondent Harrison provided a response to the Union's information request regarding Grievance #PP-4-18 on May 31, 2018 and the matter proceeded to an arbitration hearing on June 4, 2018. J.S., ¶ VII.R. A decision finding no merit to Grievance #PP-4-18 was issued by an arbitration on November 20, 2018 and the Union subsequently withdrew Grievance #PP-5-18. J.S., ¶ VII.R.

E. The ULP Charges and the Union's Attempts to Obscure its Evident Failure to Bargain with the Respondents

The Union filed its ULP charge in Case 06-CA-215195 on February 20, 2018 and the first amended charge was filed on July 20, 2018. J.S., ¶¶ II.A-B; J.E. 1(a)-(f). The Union filed its ULP charge in Case 06-CA-215196 on April 23, 2018 and the first amended charge was filed on August 24, 2018. J.S., ¶¶ II.C-D; J.E. 1(a)-(f).

Following the filing of the ULP charges, and after the Respondents raised the issue of failure to bargain as a defense, the Union sent via e-mail to the Respondents a proposed "Contractor Notification Form to Local Union" to the Respondents. J.E. 29; J.S., ¶ VII.T.

The Union attempted to insert this Form into subsequent discussions occurring in 2019 regarding its overly broad and burdensome information requests. J.S., ¶¶ VII.U-W. In fact, the Union's attempts to do so occurred regarding information requests that are admittedly unrelated to these matters, *see* J.S., ¶ VII.U., and in response to letters from the Respondents requesting bargaining over cost sharing, as has been the Respondents' consistent position regarding the Union's information requests. J.S., ¶¶ VII.U-W. The Union continued, as late as March 7, 2019, to refuse to bargain with the Respondents regarding such cost sharing. J.E. 31-32.

III. ARGUMENT

The ULP charges should be dismissed because the Respondents did not violate Section 8(a)(1) or Section 8(a)(5) of the Act. To the contrary, the Union's overbroad information requests sought irrelevant information. Moreover, the Union repeatedly refused to modify its requests to obtain relevant information and repeatedly refused to bargain with the Respondents over the costs associated with responding to the requests. It is evident that the Union's "cut-and-paste" e-mail information requests were not offered in good faith, but were a tactic employed to harass and intimidate the Respondents. The Union cannot be rewarded for this conduct.

Finally, the Respondents note that recent revisions to the Federal Rules of Civil Procedure, which acknowledge the effects of electronically stored information and the ability of parties to communicate via e-mail, support the Respondents' arguments in this case and strongly suggest that the Board should acknowledge that proportionality should play a role in considering the parties' obligations under the Act in propounding and responding to information requests.

A. The Union's Information Requests were not Relevant

Under the Act, employers have obligations to provide relevant information to collective bargaining representatives so that they may fulfill their representational duties and police compliance with collective bargaining agreements. *See e.g., NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). But employers' obligations in this regard are not absolute or without limit. When a request for information pertains to bargaining unit employees, then the information is presumptively relevant and must be provided. *See, e.g., Richmond Healthcare*,

332 NLRB 1304, 1305 n.1 (2000); *Associated Ready Mixed Concrete, Inc.*, 318 NLRB 318 (1995), *enfd*. 108 F.3d 1182 (9th Cir. 1997).[5]

However, requests relating to the contracting out of work, which are the issue in this matter, are not presumptively relevant and do not impose the same obligations on employers. "Information about subcontracting agreements, even those relating to bargaining unit employees' terms and conditions of employment, is not presumptively relevant." *Disneyland Park*, 350 NLRB 1256, 1258 (2007) (*citing Richmond Healthcare*, 332 NLRB at 1305 n. 1); *see also Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 430-431 (5th Cir. 2008) ("[W]hen a union requests non-bargaining unit data, such as subcontracting costs, that information is not considered presumptively relevant."). In circumstances such as these, the Union must establish the relevance of the requested information. *Ohio Power Co.*, 216 NLRB 987, 991 (1975), *enfd*. 531 F.2d 1381 (6th Cir. 1976) ("[W]here the request is for information with respect to matters occurring outside the unit, the standard is somewhat narrower (as where the precipitating issue or conduct is the subcontracting of work performable by the employees within the appropriate unit) and relevance is required to be somewhat more precise.").

In this case, it is plain that the Union sought information regarding all contracting performed for Respondents, not just contracting that could have affected bargaining unit work.

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[5] Aside from the overly broad and burdensome blanket information requests submitted by the Union, the only other alleged violation of the Act involves a claim that the Respondents did not respond and/or did not respond in a timely manner to information requests regarding particular grievances. J.S. ¶¶ VIII, VII.Q-R. But it is undisputed that Grievance #1702-31-18 at Monongalia County was settled after the parties reached agreement to settle a related grievance. J.S. ¶ VII.Q. Further, with regard to Grievance #PP-4-18, it is undisputed that Respondent Harrison provided the information requested in advance of the arbitration hearing and there is no allegation of prejudice to the Union in its response. J.S. ¶ VII.R. Further, the parties agreed to hold the processing of Grievance #PP-5-18 pending the resolution of Grievance #PP-5-18. Accordingly, the Respondents complied with their obligations to furnish relevant information under the Act.

See J.S., ¶¶ VII. A, B, C, D, F, G, I, J, K; J.E. 7, 9, 10, 12, 13, 15(a), 15(b), 16, 18. The Union's requests, a total of 8 in 27 days, all sent via e-mail, sought "[a]ll invoice [sic] for contractors number of contractors and all work performed by contractors." On various occasions, the Union was informed that the requests were overly broad and sought irrelevant information, with the Respondents offering the Union the opportunity to narrow the requests. J.E. 8, 11, 17, 20, 21, 28, 30(a-b).

Not only did the Union refuse every entreaty to narrow the scope of its requests, but Union did not even attempt to establish the relevance of contracting work relating to non-bargaining unit employees, despite its burden to do so. *See Disneyland Park*, 350 NLRB 1256, 1258 (2007) (*citing Knappton Maritime Corp.*, 292 NLRB 236, 238-239 (1988)); *Island Creek Coal,* 292 NLRB 480, 490 n. 19 (1989). As such, the Respondents were not obligated to provide the requested information. *Disneyland Park*, 350 NLRB at 1258.

In *NLRB v. Wachter Constr., Inc.*, 23 F.3d 1378 (8th Cir. 1994), the U.S. Court of Appeals for the Eighth Circuit reversed and denied a Board order holding that an employer violated Section 8(a)(5) by failing to furnish requested information to the union. The request at issue sought information relating to subcontractor agreements and the wages paid by subcontractors to their employees and laborers. *Id*. at 1383. In that case, and is this matter, the union proffered no evidence of why this information was relevant other than to allege that it was necessary to ensure compliance with the collective bargaining agreement. *Id*. at 1385. The Court of Appeals explained that such a generalized response cannot establish relevancy for information going back over a substantial period of time, and found that the union's request was not made in good faith. *Id.*

The Union offered nothing more than the generalized claim of monitoring compliance with the NBCWA as its explanation for relevance. *See* J.E. That explanation is insufficient and as such the Union has not met its burden of establishing the relevance of its overbroad requests for information. *See Wachter Constr., Inc.*, 23 F.3d 1378.

B. The Union Refused to Bargain with the Respondents

Even if the Union had met its burden of establishing the relevance of the information requested, the Respondents' responses to those requests were lawful. This is so because prior Board decisions have held that, when information requests are overly broad and unduly burdensome, and an employer notifies a union of its concerns, the union must try to accommodate and discuss the issues with the employer. *See United Parcel Serv. of Am., Inc. & Int'l Bhd. of Teamsters, Local Union 373*, 362 NLRB No. 22, 2015 WL 849193, at *3 (2015) ("If, for example, the employer has a legitimate claim that a request for information is unduly burdensome or overbroad, it must articulate those concerns to the union and make a timely offer to cooperate with the union to reach a mutually acceptable accommodation. Correspondingly, where an employer fulfills those obligations, the union may not ignore the employer's concerns or refuse to discuss a possible accommodation, even when the requested information is presumptively relevant.").

Moreover, the Board has long held that a union may be required to pay the reasonable costs of providing the information requested, and that parties are obligated to bargain in good faith over which party shall bear such costs. *Food Emp'rs Council*, 197 NLRB 651 (1972) ("If there are substantial costs involved in compiling the information in the precise form at the intervals requested by the Union, the parties must bargain in good faith as to who shall bear such costs."); *United Aircraft Corp.*, 192 NLRB 382 (1971), *enfd. in relevant part* 534 F.2d 422 (2d

Cir. 1975) (explaining that the union is not "entitled to [] information in the exact form or on the exact terms requested," and that the employer "was not required to duplicate or conform its records, at its own cost, for the convenience of the Unions"); *American Telephone & Telegraph Co.*, 250 NLRB 47, at *1 n. 2 (1980), *enfd. sub nom*. Communications Workers Local 1051 v. NLRB, 644 F.2d 923 (1st Cir. 1981) (modifying the ALJ's order "to provide, or allow the Union to make, the photocopies, and to bargain over the reasonable additional costs to the Employer, for furnishing the requested information," which "shall be assumed by the Union").

In this case, The Respondents objected to the Union's repeated, blanket requests for information regarding contracting and "articulate[d] those concerns to the union and ma[d]e a timely offer to cooperate with the union to reach a mutually acceptable accommodation." *See United Parcel Serv., 362 NLRB No. 22, at *3*. In fact, on at least five occasions, *see* J.E. 17, 19, 21, 30(a), 30(b), the Respondents asked that the Union narrow its overbroad requests by confining them to some particular type of work, contractor, project or pending grievance, to reduce the time and expense associated with responding to the requests or to negotiate over the cost of responding to the overly broad requests. In making these reasonable requests, the Respondents satisfied their obligations under the Act. The Union, in contrast, failed to do so.

C. The Union's Information Requests were made in Bad Faith

The ULP Charges should also be dismissed because the Union's information requests were made in bad faith. Therefore, the Respondents had no obligation to respond to them. *See W. Elec. Co.*, 223 NLRB 86, 92 (1976) ("[A] union's request for information presupposes that it seeks such information as a good-faith act in the discharge of its duty as the exclusive representative of the unit employees, rather than as an harassing tactic and not in a *bona fide* effort to obtain pertinent bargaining data."); *see also KLB Indus., Inc. d/b/a Nat'l Extrusion &*

Mfg. Co. & Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am., 357 NLRB 127, 130 (2011) ("To the extent that an employer truly is faced with abuse or harassment, longstanding Board precedent already provides a defense.") (*citing Farmer Bros. Co. & Teamsters Local No. 206, Affiliated with Int'l Bhd. of Teamsters, AFL-CIO*, 342 NLRB 592, 594 (2004) ("An employer is not obligated to comply with a request for wage information when the information isn't sought in good faith by the union as an aid to the performance of its statutory duties but is sought for a bad-faith purpose.")).

As discussed above, in *NLRB v. Wachter Construction*, the U.S. Court of Appeals for the Eighth Circuit rejected the Board's ruling that the employer had violated Section 8(a)(5) by failing to supply the union with information regarding the employer's subcontracting, finding that the union's requests for information were made in a bad faith effort to harass the employer into contracting only with unionized paving contractors. 23 F.3d at 1389. The Board also has held that a union's refusal to engage in a dialogue or acknowledge a legitimate concern by an employer can serve as evidence of a union's bad faith in making the information request. *See United Parcel Service*, 2015 WL 849193, at *6 (noting that where the respondent sought to lessen its burden by negotiating an accommodation based on the union's needs, and the union ignored the request for an explanation and merely repeated that it wanted every document requested "[b]oth the failure to explain and the refusal to compromise reflect on the Union's motivation.")

A review of the record reveals the Union's bad faith in this regard. Beginning in January 2018, the Union began a campaign of issuing blanket information requests to Respondent Monongalia regarding work performed by all contractors at the Mine, even though the Union represents only the hourly production and maintenance employees. J.S., ¶¶ VII. A, B, C, D, F,

G, I, J, K; J.E. 7, 9, 10, 12, 13, 15(a), 15(b), 16, 18. As noted previously the requests, a total of 8, submitted in a period of a mere 27 days, were all sent from a Vice President of the Union's Local 1702, via e-mail, with a pre-packaged request pasted into the message. All were essentially identical (with only the dates changing and sometimes with subsequent requests subsuming the material requested in earlier requests). J.S. ¶¶ IV.A-B, V.C; J.E. 7, 9, 10, 13, 15(a), 15(b), 16, 18.

In addition, the Union's desperate and belated attempts to fix their errors in repeatedly refusing to bargain over the costs involved in responding to their requests by proposing a form to the Respondents months later only highlights its bad faith in this case. See J.E. 29; J.S., ¶¶ VII.T-W.

As in *Wachter*, the Union here has refused to explain the relevance of its overbroad information requests. This, paired with its refusal to engage in good faith discussions with the Respondents regarding the scope of the requests and the sharing of costs, demonstrates that the requests were made in bad faith.

For all these reasons, the Board should find that the Respondents acted lawfully when they deferred providing information in response to the Union's irrelevant and overbroad requests and instead attempted to engage in good faith bargaining with the Union regarding the scope of the requests.

D. Proportionality Should be a Consideration in Determining Obligations to Produce Information

Finally, in an age of overwhelming amounts of electronically stored information, and ease of electronic communications, an employer's obligation to respond to information requests must be understood as a balance between the significance of the information requested and the cost of gathering responsive information. In the past, the U.S. Supreme Court and the Board

have looked to the Federal Rules of Civil Procedure, and, in particular Rule 26, to determine the scope of an employer's duty to furnish information. *See e.g.*, *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 (1967) (describing the standard for determining whether information requested by a union is relevant as a "discovery-type standard"); *American Benefit Corp.*, 354 NLRB 1039, 1052 n. 19 (2010) (describing Rule 26(b) of the Federal Rules of Civil Procedure as "the schema on which the 'broad discovery-type standard' followed by the Board is based").

Historically, the Board has relied upon a prior version of Rule 26(b), which defined the scope of discoverable information broadly to include all information that is "reasonably calculated to lead to the discovery of admissible evidence." *Service Employees Local 715 (Stanford Hospital)*, 355 NLRB 353, 355 n.10 (2010) (*citing Westinghouse Electric Corp.*, 304 NLRB 703, 708 (1991) (citations and internal quotation marks omitted)). That prior version of Rule 26(b) provided the basis for the Board to adopt a "liberal discovery standard" for purposes of responses to information requests. *Id*. at 355-56.

Recent changes to the Federal Rules of Civil Procedure, however, have resulted from a recognition of the ability of parties requesting information to overwhelm and harass those having the obligation to respond to such requests. As a result, the Rules have modified the "liberal discovery standard" that had been the hallmark of the Rules and which was previously relied on by the Board. Indeed, in December 2015, Rule 26(b) was amended to, among other things, remove the phrase "reasonably calculated to lead to the discovery of admissible evidence." The rule instead adopts a "proportionality standard," which explicitly requires litigants to narrowly tailor their discovery requests so as to balance the significance of the information requested with the cost of gathering responsive information. The new Rule 26(b) states:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to

> the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1).

Another amendment to Rule 26 implements a cost-shifting mechanism that can be used to require parties requesting information to bear the cost of such requests. Fed. R. Civ. P. 26 (c)(1)(B) ("A party or any person from whom discovery is sought may move for a protective order. . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery").

In light of these changes, the Board's "liberal discovery standard"— based on an outdated version of the Rule 26(b)—must be revisited to reflect the changes in electronically stored information. Importantly, the Board has already implemented changes to its own discovery standards in response to the changes in the Federal Rules. The most recent NLRB Division of Judges Bench Book adopts the new rule with regard to subpoenas. Noting that Rule 26(b)(1) "sets forth a balancing test," the Bench Book states that "the burdensomeness of production may be grounds for revoking or limiting a subpoena." NLRB Division of Judges Bench Book (January 2018), § 8–330.

The Board should likewise import the new proportionality and cost-sharing standards in Rule 26(b) and (c) into its analysis here. Applying those standards to this case, there can be no question that the Respondents' reasonable responses to the Union's irrelevant, overbroad and burdensome information requests did not violate the Act.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the National Labor Relations Board enter a finding that the Respondents did not violate Sections 8(a)(1) or 8(a)(5) of the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of the Respondents in the above-captioned matters was filed electronically with the National Labor Relations Board, and was served via e-mail on the following addresses indicated this 8th day of November, 2019:

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